Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

WAYNE A. YOUNG, et al.,

Petitioners,

v.

CITY OF JACKSONVILLE, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a claim for nominal damages for alleged violations of the First Amendment is a sufficient remedy, in and of itself, to satisfy the case or controversy requirement for Article III standing.

2. Whether claims for declaratory and injunctive relief can be dismissed at the motion to dismiss stage for want of Article III standing where the sole ground for the dismissal is not found in the complaint.

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PETITION FOR WRIT OF CERTIORARI

The undersigned counsel of record, on behalf of petitioners, Wayne A. Young, Marvin R. Edwards, Marvin F. Ferguson, Robert E. Garmon, Joseph B. Grooms, Henry W. Hart, Joseph R. Howell, Brandon T. Nelson, George A. Rhoden, and Joseph A. Blake, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion for the court of appeals (App., *infra*, p. 1) is unreported. The opinion and order of the district court (App., *infra*, p. 23) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2003. App., *infra*, 21. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution as incorporated by the Fourteenth Amendment.

STATEMENT

Petitioners are ten Firefighters who are Christians and are employed by the City of Jacksonville, Florida Fire and Rescue Department (the "City"). They filed a 42 U.S.C. §1983 lawsuit against the City of Jacksonville on September 10, 2001 in the United States District Court for the Middle District of Florida, Jacksonville Division, invoking the jurisdiction of the district court under 28 U.S.C. §1331 (jurisdiction over claims arising under the Constitution of the United States), under 28 U.S.C. §1343(3)(4) (jurisdiction over claims for deprivation of rights under color of any State law, statute, ordinance, regulation custom or usage), and 28 U.S.C. §§2201 and 2202 (jurisdiction to grant declaratory relief). The Firefighters alleged that the City of Jacksonville violated their rights under the First Amendment of the Constitution when it ordered them to attend a training program that taught Buddhist religious beliefs which included, among other Buddhist teachings, the claim that to be successful and have a closer relationship to God, the Firefighters must follow their dharma.

A. Firefighters Were Ordered to Attend Training Program That Taught Buddhist Religious Doctrine as the Key to Getting Closer to God and Having a Successful Life

This case involves fundamental questions about Article III standing in 42 U.S.C. §1983 cases where nominal damages are requested for alleged First Amendment violations.

In September 2000, the Mayor of the City of Jacksonville, Florida ordered all Fire and Rescue Department

personnel, including the Firefighters, to attend and participate in a quality training program called *Secrets of Successful People* (the "Program").[1] App., *infra*, pp. 8-9, 13. During the course of the Program, the Firefighters and their colleagues were instructed in the Buddhist religious belief that to be successful and have a closer relationship to God, they must follow their "dharma." App., *infra*, pp. 8-9, 13. The Program taught participants that straying from the path of dharma results in regression, and in a negative impact on them and the environment. App., *infra*, pp. 8-9. Other Buddhist religious beliefs espoused in the Program included "The Four Noble Truths of Buddha." App., *infra*, pp. 9, 14. The Firefighters were taught that these "truths" include the belief that "life is imperfect," the purpose of which imperfection is to "push people closer to God," that the cause of life's difficulties and suffering is attachment and craving, that "inner-peace and end to all suffering exists within each person," that "everyone has the ability to achieve Nirvana, and there is a tried and proven path to accomplish this inner-fulfillment," which, the Program advised, "[t]he Buddha calls . . . Nirvana." App., *infra*, pp. 9, 14.

The Program's Buddhist teachings were and are antithetical to the religious beliefs of the Firefighters. App., *infra*, pp. 9-10, 12-13. As a matter of religious faith and personal conscience, each of the Firefighters believes that Jesus Christ is "the Way, the Truth, and the Life;" that "there is no other name under heaven or earth by which man can be saved;" that to have a successful life, they "are to delight [themselves] in the law of the Lord

[1] The Program consisted of a 30 page booklet and a three hour video. App., *infra*, p. 13.

and meditate in it day and night;" that they are not to follow "false teachings," or "false doctrine;" that true peace comes from God, not inner-man; that life's difficulties are the result of man's sin; and that they "are to have no other gods" before the God of the Bible. App., *infra*, pp. 9-10, 13.

Despite strenuous objections to the religious content of the Program and to the City of Jacksonville's endorsement of it, and despite their request that the City accommodate them by allowing them to participate in an alternative training program readily available to the City, the Firefighters were ordered to attend the Program.[2] App., *infra*, p. 13. Appeals to their union representative failed to get the Firefighters relief and they were forced to participate in the Program. App., *infra*, 13. Plaintiffs thereafter filed grievances with the Equal Employment Opportunity Commission under Title VII, 42 U.S.C. §2000e *et seq.*, exhausting their administrative remedies and eventually receiving "right to sue" letters from the Department of Justice. App., *infra*, p. 15.[3] The Firefighters thereafter filed a complaint pursuant to 42 U.S.C. §1983 alleging that the City had violated their rights under the Establishment Clause, Free Exercise Clause, and the Free Speech Clause, in addition to seeking relief under Title VII, 42 U.S.C. §2000e *et seq.*, alleging religious discrimination. App., *infra*, pp. 15-19.

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[2] The Firefighters had only a brief amount of time to seek relief from the mandatory attendance requirement. They first received notice of the Program on September 25, 2000 through a bulletin that also advised them that they had to complete the Program by September 30, 2000. App., *infra*, p. 13.

[3] One Petitioner, Joseph R. Howell, did not file a grievance with the Equal Employment Opportunity Commission.

The question presented here is whether the Firefighters, who clearly alleged an injury in fact as a result of their compelled attendance at the Program and the City's endorsement of the same, have standing to pursue their nominal damages claim for the alleged First Amendment violations where their claims for injunctive and declaratory relief have been dismissed and no actual injury was alleged.

B. Proceedings Below

In the district court, the City moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the Firefighters' claims as moot.[4] App., *infra*, 23. The district court granted the motion to dismiss, but on Article III standing grounds rather than mootness grounds. App., *infra*, p. 27.

In ruling that the Firefighters lacked Article III standing to pursue their claim for nominal damages, the district court found *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (nominal damages to be awarded upon proof of constitutional violation) inapposite because, the district court reasoned, *Carey* "cannot be understood to allow a plaintiff who has an otherwise non-justiciable case to maintain the action based on nominal damages alone." App., *infra*, p. 26. "This is especially true, here," said the district court, "where there is no justiciable controversy

[4] Because standing and mootness both pertain to a federal court's subject-matter jurisdiction under Article III, they are properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), not Rule 12(b)(6).

permitting declaratory or injunctive relief and where Plaintiffs' request for nominal damages is merely incidental to the equitable relief they seek." App., *infra*, p. 26. It was assumed but not explained by the district court that a nominal damage request for a past constitutional violation is incidental to equitable relief.

The district court asserted, but did not say how the Firefighters' claim for *past* constitutional injury was "otherwise nonjusticiable" or why nominal damages alone could not sustain the Firefighters' action. The district court relied upon two due process cases, *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2d Cir. 1973) (Timber, J., concurring) and *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d Cir. 1971), App., *infra*, p. 26, as the bases for its ruling. The district court, however, failed to note that those two pre-*Carey* decisions did not involve claims for nominal damages for the alleged constitutional violations, but rather, concerned compensatory damage claims that were nominal (*i.e.*, small) in amount and attributable to an alleged denial of due process.

The district court also ruled that the Firefighters did not have Article III standing to litigate their claims for declaratory and injunctive relief because, said the court, "Plaintiffs make no allegations that Defendant plans to continue using the offending program or that Defendant intends to require Plaintiffs to participate once again in the program [and that] there is no alleged threat of future injury warranting their need for injunctive relief." App., *infra*, p. 25. The district court did not accept as true all material allegations of the Firefighters' complaint, nor did it construe the complaint in favor of the Firefighters as decisional law requires. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (at the pleading stage, general

factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support the claim" (internal citation and quotation marks omitted)); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993).

The district court dismissed the Firefighters' complaint and a timely appeal was made to the United States Court of Appeals for the Eleventh Circuit. In a *per curiam* decision, the court of appeals affirmed the district court ruling. App., *infra*, pp. 1-7.

The court of appeals, like the district court, concluded "that the Plaintiffs' claim for nominal damages is merely incidental to the injunctive relief requested and does not . . . elevate a nonjusticiable matter into a legitimate case or controversy under Article III." App., *infra*, p. 5. And, like the district court, the court of appeals cited *Hernandez* and *Kerrigan* in support of its finding that the Firefighters' nominal damages claim is "de minimis" and thus nonjusticiable. The court also relied on *Ingraham v. Wright*, 430 U.S. 651 (1977), another due process case, in support of its view that the Firefighters' First Amendment claims are de minimis, saying, "[t]here is, of course, a de minimis level of imposition [on a constitutionally protected interest] with which the Constitution is not concerned." App., *infra*, p. 5 (quoting *Ingraham*, 430 U.S. at 674) (bracketed material added by court of appeals) (internal quotation marks omitted). Furthermore, the court of appeals found that no *actual injury* from viewing the Program was alleged, App., *infra*, p. 5, but it did not distinguish this Court's decisional law which holds that deprivation of constitutional rights is actionable *without proof of actual injury*. *See,*

e.g., Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986). Moreover, the court of appeals incorrectly asserted that the Firefighters sought only a declaration that the training program is unconstitutional on its face, App., *infra*, p. 2, when in fact they sought a declaration that the Program is unconstitutional on its face *and as applied*. App., *infra*, pp. 16-19.

The court distinguished the Firefighters' nominal damages claim for alleged constitutional injuries from *Carey* on the ground that "in *Carey*, petitioners' standing was not a threshold issue; they had standing to bring claims regarding compensatory, as well as nominal, damages for a constitutional violation." App., *infra*, p. 6. The court of appeals did not say why the Firefighters' nominal damages claim for First Amendment violations is inadequate for Article III standing purposes but a nominal damages claim for a due process violation such as that alleged in *Carey* is adequate for standing purposes under Article III.

The court of appeals also agreed with the district court that the Firefighters "did not have standing at the time their claims were filed to request prospective declaratory and injunctive relief. . . ." App., *infra*, p. 4. And, though it recited the standard of review for a motion to dismiss, the court of appeals did not accept as true all material allegations of the Firefighters' complaint, nor did it construe the complaint in favor of the Firefighters. App., *infra*, pp. 3-4. Indeed, the court simply ignored the Firefighters' claims for nominal damages for First Amendment violations arising from past conduct.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Eleventh Circuit in this case was decided in a way that conflicts with applicable decisions of this Court and with the applicable decisions of other circuit courts of appeal. Moreover, the decision below is erroneous and the issues that it addresses are of great public importance because they directly and profoundly impact the ability of private citizens to seek redress for violations of their First Amendment rights.

I. The Court of Appeals Decision Was Decided in a Way That Conflicts with Applicable Decisions of this Court

In *Carey*, this Court held that the denial of procedural due process is actionable for nominal damages without proof of actual injury. 435 U.S. at 266. It is the obvious importance to organized society that constitutional rights be scrupulously observed that led this Court to make the deprivation of such rights "actionable for nominal damages without proof of actual injury." *Id.*; *see also, Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (making clear that nominal damages are the appropriate means of vindicating rights whose deprivation has not caused actual, provable injury). Nominal damages, then, provide redress for the violation of constitutional rights as such. Despite the clear teaching of this Court, the court of appeals ruled instead that because the Firefighters had "asserted no *actual* injury," App., *infra*, p. 5 (emphasis supplied), and because their claim for nominal damages was "de minimis" and "incidental to the injunctive relief requested," they did not have "a legitimate case or controversy under Article III." App., *infra*, p. 5. Nominal

damages, then, without more, according to the court of appeals, are not an appropriate means of vindicating rights whose deprivation has not caused actual, provable injury. It is a decision in sharp conflict with *Carey* and *Stachura*.

And as would be expected when a court of appeals decides a case in a way that conflicts with applicable decisions of this Court, the decision below is also in conflict with other circuit courts of appeals. For example, in *Bernhardt v. County of Los Angeles*, 279 F.3d 862 (9th Cir. 2002), the court held that the possibility of nominal damages created a continuing and live controversy for a party alleging constitutional injury even where claims for declaratory and injunctive relief had been dismissed. *Id.* at 871. Similarly, in *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1992), the defendants argued that a suit against the city and Police Department should not go forward because the plaintiff stood to obtain only nominal damages. *Id.* at 316-317. The court, however, held that assertion to be "contrary to the rationale behind permitting suits based on the deprivation of constitutional rights to proceed despite a lack of proof as to actual injury." *Id.* at 317. Recently, in *Mellen v. Bunting*, 327 F.3d 355, 2003 U.S. App. LEXIS 8014 (4th Cir. 2003), the court ruled that although plaintiffs' claims for declaratory and injunctive relief were moot, it held "their damage claim continues to prevent a live controversy." 2003 U.S. App. LEXIS *16-17. And in *Committee for the First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992), the court reversed a grant of summary judgment regarding a claim for nominal damages and held that nominal damages as a sole basis for relief conferred standing: "We reverse due to legal error. [T]he district court erred in dismissing the nominal

damages claim which relates to *past* (not future) conduct. If proven, a violation of First Amendment rights concerning freedom of expression entitles a plaintiff to at least nominal damages." *Id.* at 1526-27 (citations omitted).

Accordingly, the court of appeals' decision is in conflict with applicable decisions of this Court and with applicable decisions of other circuit courts of appeal. This Court should, therefore, grant the Firefighters' petition to correct the error of the court below.

II. The Decision of the Court of Appeals is Erroneous

The court below clearly erred by failing to abide by the requirement that at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss courts must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). Instead, the court of appeals, in ruling that the Firefighters lacked standing to request prospective declaratory and injunctive relief at the time their claim was filed, relied *entirely* upon its incorrect and naked assertion that "[t]he Defendant *ceased* the training program at issue approximately one year before the filing of this lawsuit in date."[5] App., *infra*, p. 4 (emphasis supplied). In fact, the

[5] Although the court of appeals set forth the proper standard of review in a motion to dismiss, App., *infra*, p. 3, it clearly failed to apply that standard, as evidenced by its bare unsupported assertion that the "Defendant *ceased* the training program at issue approximately one year before the filing of this lawsuit to date." App., *infra*, p. 4.

Firefighters did not assert in their complaint that the Program had "ceased," but instead alleged that they had been ordered to attend and participate in the allegedly unconstitutional Program, and thus requested a declaration of its unconstitutionality and an injunction in order to be protected from any potential further use of the Program.[6] App., *infra*, pp. 8-19. It was clear error for the court below to assume, with no factual basis, that the City would not utilize the Program again. Had the court of appeals presumed that the Firefighters' general allegations embraced the specific facts that are necessary to support their claims, it could not have dismissed those claims.

The court of appeals also erred by treating the Firefighters' nominal damages claim, which related to past conduct, as "merely incidental to the injunctive relief" and thus "nonjusticiable." App., *infra*, p. 5. That is another way of saying, contrary to this Court's holdings, that nominal damages really do not redress violations of constitutional rights. The court of appeals then compounded its error when it found the Firefighters' nominal damages claim "de minimis" because they "asserted no actual injury from viewing the program." App., *infra*, p. 5. There is an unmistakable juridic dissonance sounding between the court of appeals' dismissive treatment of the Firefighters' nominal damages claim for alleged First Amendment violations and

[6] To satisfy Article III's standing requirements, a plaintiff must show (1) she has suffered an "injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000).

this Court's decisions which hold that by making the deprivation of constitutional rights "actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey,* 435 U.S. at 266. Indeed, the holding of the court of appeals is irreconcilable with *Carey and Stachura.*

The court of appeals' decision is clearly erroneous. This Court should, therefore, grant the Firefighters' petition to correct the court of appeals' error.

III. The Questions Presented Are Important

There can be few if any questions of greater import than that which asks if this Court's decisions may be disregarded by inferior tribunals without correction. And this particularly so where constitutional rights of individual citizens are made the victim. Nor does the signification of the matter suffer diminution where, as here, the court of appeals' opinion that contradicts this Court's decisions is accomplished through an "unpublished" opinion. While such an opinion is conceived, as it were, in the shadows, suggesting its effect will extend no further than the unfortunate subjects of its illicit decree, the injury is in fact visited upon a constitutional order that is premised on the ground that we are a government of laws, and not of men. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The shadow-land of unpublished opinions should not provide a cloak of immunity to the court of appeals' opinion which is in conflict with this Court's applicable decisions.

Chief Justice Marshall long ago also observed that "the very essence of civil liberty certainly consists in the

right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* This Court's decisions in *Carey* and *Stachura* afforded the protection of the laws for violation of constitutional rights by recognizing a remedy, nominal damages, as necessary to protect constitutional rights without proof of actual injury. The court of appeals, however, denied that protection of the laws to the Firefighters. The decision below is not one of mere error that, while unfortunate, affects only the parties to the case and does not properly command the attention of this Court. Rather, it is a solecism against "the very essence of liberty."

In sum, the court of appeals' decision conflicts with this Court's decisions in *Carey* and *Stachura*, as well as the decisions of other courts of appeal, and, left unrequited by this Court, it will stand as a monument to injustice and a shrine to raw power. This Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15460
Non-Argument Calendar

D. C. Docket No. 01-01025-CV-J-25

WAYNE A. YOUNG,
MARVIN R. EDWARDS,
MARVIN R. FERGUSON,
ROBERT E. GARMON,
JOSEPH B. GROOMS,
HENRY W. HART,
JOSEPH R. HOWELL,
BRANDON T. NELSON,
GEORGE A. RHODEN,
JOSEPH A. BLAKE,

Plaintiffs-Appellants,

versus

CITY OF JACKSONVILLE, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed February 27, 2003)

Before TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

The Plaintiffs-Appellants are employees of the Defendant-Appellee, the City of Jacksonville, Florida, and work in the City's Fire and Rescue Department. The Plaintiffs sued the Defendant City complaining that, in September 2000, the Defendant forced them to participate in a training program that incorporated certain Buddhist beliefs. The Defendant discontinued the program almost one-year prior to the Plaintiffs' filing their lawsuit. The district court dismissed the Plaintiffs' action for lack of standing. After review, we affirm.

I. FACTUAL ALLEGATIONS IN THE COMPLAINT

The Plaintiffs are Christians and voiced their objections to the Defendant's training program. The training program was entitled "Secrets of Successful People" and consisted of a thirty-page booklet and a three-hour video. The complaint contends that this training program violated the Plaintiffs' First Amendment right to Free Exercise of Religion and Free Speech, violated the Establishment Clause of the First Amendment, constituted viewpoint discrimination in violation of the First Amendment, and constituted religious discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* The Plaintiffs sought a declaration that the training program is unconstitutional on its face and in violation of Title VII, a permanent injunction enjoining the Defendant from future use of the program, and nominal damages.

The Defendant City ceased use of this training program nearly one year prior to the commencement of the Plaintiffs' lawsuit.[1]

The district court granted the Defendant's motion to dismiss. The district court concluded (1) that the Plaintiffs did not have standing to request declaratory and injunctive relief because the Plaintiffs did not allege any facts from which it could reasonably be inferred that the Defendant continues to use or will again use the offending program and (2) that the Plaintiffs' request for nominal damages could not, under these circumstances, elevate an otherwise non-justiciable matter into a legitimate Article III case or controversy, particularly where the Plaintiffs' request for nominal damages is merely incidental to the equitable relief they seek.

II. STANDARD OF REVIEW

When a defendant challenges standing in a motion to dismiss, this Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993); *see Bischoff v. Osceola County*, 222 F.3d 874, 878 (11th Cir. 2000). Standing is a jurisdictional issue and is reviewed *de novo*. *Engineering*

[1] The filing of the Plaintiffs' suit was delayed in part due to their exhaustion of administrative remedies and their subsequent request for and receipt of a right to sue letter.

Contractors Ass'n v. Metropolitan Dade County, 122 F.3d 895, 903 (11th Cir. 1997).[2]

III. DISCUSSION

The Defendant ceased the training program at issue approximately one year before the filing of this lawsuit in date. In addition, there is no indication that the Plaintiffs will be subjected to the same quality training program in the future. Thus, we agree with the district court that the Plaintiffs did not have standing at the time their claims were filed to request prospective declaratory and injunctive relief for constitutional and statutory violations.[3] *See*

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[2] As a factual matter, the Defendant challenged the Plaintiffs' claims as being moot. The district court recognized that the appropriate inquiry was as to standing.

[3] The Supreme Court stated:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal footnote, quotations and citations omitted). In other words, the Plaintiffs clearly fail to meet the third prong of standing: re-institution of the quality training program at issue is "speculative" at best according to the record.

Wooden v. Bd. of Regents, 247 F.3d 1262, 1285 (11th Cir. 2001).

We also conclude that the Plaintiffs' claim for nominal damages is merely incidental to the injunctive relief requested and does not, under the circumstances of this case, elevate a nonjusticiable matter into a legitimate case or controversy under Article III. The de minimis nature of the Plaintiffs' nominal damages claim is reflected in the Plaintiffs' complaint, which focused almost exclusively on elimination of the program through declaratory and injunctive relief, asserted no actual injury from viewing the program, and referenced nominal damages cursorily, signaling they are incidental to the Plaintiffs' defunct equitable claim. *See Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971) ("Not having found a justiciable controversy permitting a declaration, the claim for nominal damages, which is clearly incidental to the relief sought, cannot properly be the basis upon which a court should find a case or controversy where none in fact exists."); *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2d Cir. 1973) (Timbers, J., concurring) (citing *Kerrigan* for the proposition that damage claim raised is "one by which appellant essentially is seeking an adjudication of the unconstitutionality of [the statute]" and does not constitute, on its own, a justiciable case or controversy); *see also Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (stating "[t]here is, of course, a de minimis level of imposition [on a constitutionally protected interest] with which the Constitution is not concerned").

We recognize that the Plaintiffs rely heavily on *Carey v. Piphus*, 435 U.S. 247 (1978), where the Supreme Court stated that "if, upon remand the District Court determines that [no actual injury occurred], respondents nevertheless

will be entitled to recover nominal damages not to exceed one dollar from petitioners." *Id.* at 266. However, in *Carey*, petitioners' standing was not a threshold issue; they had standing to bring claims regarding compensatory, as well as nominal, damages for a constitutional violation.[4] The holding in *Carey* is not as expansive as the Plaintiffs argue. *See Oliver v. Falla*, 258 F.3d 1277, 1280 (11th Cir. 2001) (rejecting argument that *Carey* mandates an award of at least nominal damages for all constitutional violations, such as an Eight Amendment claim). Thus, *Carey* does not stand for the principle that a claim for nominal damages for any alleged constitutional violations is always sufficient, in and of itself, to create the necessary case or controversy required for standing.

Further, the Plaintiffs do not have a cognizable claim for nominal damages under Title VII because Title VII does not so provide. In addition, *Carey* did not involve a claim for a constitutional violation under Title VII, and *Carey* does not provide a basis for standing under Title VII. *See Walker v. Anderson Elec. Connectors*, 944 F.2d 841 (11th Cir. 1991) ("*Carey* does not [ ] address the issue of nominal damages in a Title VII action. *Carey* involved interpretation of 42 U.S.C. § 1983, which provides a remedy for violations of constitutional rights by persons acting under color of state law. . . . Nothing in *Carey* mandates the award of nominal damages for statutory violations.").

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[4] The Supreme Court in *Carey* considered "the elements and prerequisites for recovery of damages [compensatory, punitive and nominal] by students who were suspended from public elementary school without procedural due process." *Id.* at 248.

IV. CONCLUSION

For these reasons, we affirm the district court's dismissal of the Plaintiffs' complaint.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WAYNE A. YOUNG,	)	**Civil Action No.**
MARVIN R. EDWARDS,	)	3:01-CV-1025-J-25-TJC
MARVIN F. FERGUSON,	)	
ROBERT E. GARMON,	)	
JOSEPH B. GROOMS,	)	**COMPLAINT**
HENRY W. HART,	)	
JOSEPH R. HOWELL,	)	
BRANDON T. NELSON,	)	
GEORGE A. RHODEN	)	
and, JOSEPH A. BLAKE	)	
Plaintiffs,	)	
v.	)	
CITY OF JACKSONVILLE, FLORIDA,	)	
Defendant.	)	

I. PRELIMINARY STATEMENT

1. This is a civil rights action challenging a quality training program, mandated by the Mayor of the City of Jacksonville, Florida (the "Defendant"), in September 2000, which all Jacksonville Fire and Rescue Department personnel, including Plaintiffs, who are Christians, were ordered to attend and participate in. The program, *Secrets of Successful People* (the "Program"), instructed Plaintiffs and their colleagues in the Buddhist religious belief that to be successful and have a closer relationship to God, they must follow their "dharma." The program taught Plaintiffs that straying from the path of dharma results in regression, and in a negative impact

on them and the environment. The Program, among other Buddhist religious beliefs, also taught Plaintiffs "The Four Noble Truths of Buddha." Plaintiffs were informed that these "truths" include the belief that "life is imperfect," the purpose of which imperfection is to "push people closer to God," that the cause of life's difficulties and suffering is attachment and craving, that "inner-peace and end to all suffering exists within each person," that "everyone has the ability to achieve Nirvana, and there is a tried and proven path to accomplish this inner-fulfillment," which, the Program advised, "[t]he Buddha calls . . . Nirvana." Plaintiffs objected to being forced to participate in the Program, but their objections were rejected by Defendant. Plaintiffs then exhausted their administrative remedies and received "right to sue" letters from the Department of Justice.

In sum, Defendant City of Jacksonville has discriminated against and trespassed upon the religious beliefs of Plaintiffs; it has prescribed an orthodoxy of belief, attitude, and opinion concerning what one must do and believe to become "successful;" and it has established the religion of Buddhism, in contravention of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2001), as well as the First and Fourteenth Amendments to the United States Constitution.

2. The Plaintiffs believe as a matter of religious faith and personal conscience that Jesus Christ is "the Way, the Truth, and the Life;" that "there is no other name under heaven or earth by which man can be saved;" that to have a successful life, they "are to delight [themselves] in the law of the Lord and meditate in it day and night;" that they are not to follow "false teachings," or "false doctrine;" that true peace comes from

God, not inner-man; that life's difficulties are the result of man's sin; and that they "are to have no other gods" before the God of the Bible. Plaintiffs were ordered to attend and participate in the Program, which taught Buddhist religious beliefs as the key to success in life.

3. Plaintiffs seek a permanent injunction enjoining Defendant City of Jacksonville, its employees, successors and agents, and all persons subject to its direction and control, from depriving Plaintiffs of their rights under Title VII and the First and Fourteenth Amendments to the United States Constitution. Plaintiffs also seek declaratory relief to determine an actual controversy between the parties, as well as damages, and reasonable costs of litigation, including attorneys fees and expenses.

II. JURISDICTION AND VENUE

4. This is a civil action seeking a declaratory judgment and injunctive relief to vindicate and safeguard First and Fourteenth Amendment rights secured by the Constitution of the United States and to safeguard rights under Title VII. This court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(3)(4), which confer original jurisdiction on federal district courts in suits to redress the deprivation of rights, privileges and immunities as stated herein, as well as 42 U.S.C. § 2000e-5(f). The court has jurisdiction over the request for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. This action is authorized by 42 U.S.C. § 1983 and Title VII, 42 U.S.C. § 2000e *et seq.*

5. Venue is proper in the United States District Court for the Middle District of Florida, Jacksonville

Division, pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 2000e-5(f), because the claims arise in the district.

III. IDENTIFICATION OF PLAINTIFFS

6. Wayne A. Young is a citizen of the United States, and a resident of Duval County, Florida. He is an Engineer with the City of Jacksonville Fire & Rescue Department.

7. Robert E. Garmon is a citizen of the United States, and a resident of Lake Butler, Florida. He has been employed by the City of Jacksonville for 31 years and is a District Chief in the City's Fire and Rescue Department.

8. Marvin F. Ferguson is a citizen of the United States, and a resident of Duval County, Florida. He has been employed by the City of Jacksonville for 31 years and is a Captain in the City's Fire and Rescue Department.

9. Marvin R. Edwards is a citizen of the United States and a resident of Duval County, Florida. He has been employed by the City of Jacksonville for 25 years and is a Combat Paramedic Captain in the City's Fire and Rescue Department.

10. Brandon T. Nelson is a citizen of the United States and a resident of Baker County, Florida. He has been employed by the City of Jacksonville for 10 years and is a Lieutenant in the City's Fire and Rescue Department.

11. Joseph A. Blake is a citizen of the United States and a resident of Duval County, Florida. He has been employed by the City of Jacksonville for 39 years and is a Lieutenant in the City's Fire and Rescue Department.

12. Joseph B. Grooms is a citizen of the United States and a resident of Keystone Heights, Florida. He has been employed by the City of Jacksonville for 10 years and is a Firefighter in the City's Fire and Rescue Department.

13. Joseph R. Howell is a citizen of the United States and a resident of Nassau County, Florida. He has been employed by the City of Jacksonville for 7 years and is an engineer in the City's Fire and Rescue Department.

14. Henry W. Hart is a citizen of the United States and a resident of Putnam County, Florida. He has been employed by the City of Jacksonville for 41 years and is a Captain in the City's Fire and Rescue Department.

15. George A. Rhoden is a citizen of the United States and a resident of Duval County, Florida. He has been employed by the City of Jacksonville for 28 years and is a District Chief in the City's Fire and Rescue Department.

IV. IDENTIFICATION OF DEFENDANT

16. Defendant City of Jacksonville, Florida, exists under the laws of the State of Florida and is a corporate entity capable of suing and being sued.

V. STATEMENT OF FACTS

17. Plaintiffs are employed by the Jacksonville Fire and Rescue Department.

18. Plaintiffs are Christians who have committed their lives to Jesus Christ and accept the Holy Bible as God's inerrant and inspired Word.

19. The Holy Bible teaches, the Plaintiffs believe, that Jesus Christ is "the way, the truth, and the Life," that "there is no other name under heaven or earth by which man can be saved," that to have a successful life, they "are to delight [themselves] in the law of the Lord and meditate in it day and night," that they are not to follow "false teachings," or "false doctrine," that true peace comes from God, not inner-man, and that they "are to have no other gods."

20. On or about September 25, 2000, Jacksonville Fire and Rescue Department sent out a training bulletin requiring all personnel to attend a quality training program that was to be completed by September 30, 2000.

21. The quality training was mandated by the Mayor of Jacksonville.

22. The quality training program, entitled *Secrets of Successful People*, consisted of a thirty page booklet and a three hour video.

23. Upon becoming aware of the Buddhist religious content of the Program, Plaintiffs made vigorous objections on religious and conscientious grounds to Defendant. Plaintiffs were, nevertheless, ordered to participate in the quality training program and to complete workbooks assigned them.

24. Plaintiffs sought assistance from their union but were informed by union president Wesley Royal that after repeated attempts to have the Program rescinded, the Defendant refused.

25. Defendant did not accommodate Plaintiffs' religious beliefs by allowing them to participate in an

alternative quality training program which was then readily available to Defendant.

26. The Program instructed Plaintiffs and their colleagues in the Buddhist religious belief that to be successful and have a closer relationship to God, they must follow their dharma.

27. The Program taught Plaintiffs and their colleagues that staying from the path of dharma results in regression and in a negative impact on them and the environment.

28. The Program, among other Buddhist religious beliefs, also taught Plaintiffs and their colleagues "The Four Noble Truths of Buddha."

29. Plaintiffs and their colleagues were taught that the first "Noble Truth" "states that life, by its nature, is flawed, difficult, and imperfect," and that "the purpose of the imperfection is to push people to grow to become better people, and closer to God."

30. Plaintiffs and their colleagues were taught that the second "Noble Truth" "is that the cause of life's difficulties and suffering is attachment and craving."

31. Plaintiffs and their colleagues were taught that the third "Noble Truth" "is that inner-peace and an end to all suffering exists within each person," which the Program advised "[t]he Buddha calls . . . Nirvana."

32. Plaintiffs and their colleagues were taught that the fourth "Noble Truth" is that "everyone has the ability to achieve Nirvana, and there is a tried and proven path to accomplish this inner-fulfillment."

33. A timely grievance was filed with the Equal Employment Opportunity Commission, Miami Division ("EEOC"), by all Plaintiffs except Joseph R. Howell.

34. The EEOC issued a Letter of Determination in response to the grievance, finding that there was reasonable cause to believe that a violation of Title VII by Defendant had occurred.

35. After referral of the matter by the EEOC to the United States Justice Department ("DOJ"), the DOJ issued "right to sue" letters to Plaintiffs.

36. The earliest date that any of the Plaintiffs received their right to sue letter was June 12, 2001.

37. As a result of Defendants' unlawful conduct, Plaintiffs have suffered irreparable injury to their rights under Title VII, 42 U.S.C. § 2000e, and the United States Constitution.

VI. ALLEGATIONS OF LAW

38. All of the acts of Defendant, its officers, agents, servants, and employees, as alleged herein, were conducted under the color and pretense of the statutes, policies, regulations and customs and usages of Defendant City of Jacksonville, Florida.

39. Plaintiffs have suffered, and will, with reasonable probability, continue to suffer irreparable injury to their rights under Title VII and the United States Constitution because Defendant, through the Program, has established a religion, violated the Free Exercise rights of Plaintiffs, prescribed what shall be the orthodox belief, attitude, and opinion of Plaintiffs regarding what one

must do to become successful in the Jacksonville Fire and Rescue Department, and engaged in religious discrimination.

VII. FIRST CAUSE OF ACTION – AMEND. I, U.S. CONSTITUTION (ESTABLISHMENT CLAUSE)

40. Paragraphs 1-39 of the Complaint are incorporated herein by reference, the same as though pleaded in full.

41. Defendant's policy, regulation, and custom and usage as set out above, both on its face and as applied, is in contravention of the Establishment Clause because it prescribes an orthodoxy of belief, attitude, and opinion favoring one religion, Buddhism, that is hostile and contrary to all other religious beliefs, including Plaintiffs' religious beliefs, thereby promoting the Buddhist religion and causing excessive entanglement between Buddhism and Defendant.

WHEREFORE, Plaintiffs pray for relief against Defendant as hereinafter set forth in the prayer for relief.

VIII. SECOND CAUSE OF ACTION – AMEND. I, U.S. CONSTITUTION (FREE EXERCISE OF RELIGION)

42. Paragraphs 1-41 of the Complaint are incorporated herein by reference, the same as though pleaded in full.

43. Defendant's policy, regulation, and custom and usage as set out above, both on its face and as applied, abridges Plaintiffs' right to the free exercise of religion, because it forced Plaintiffs to participate in training that

required adoption of religious beliefs contrary to their own sincerely held religious beliefs.

WHEREFORE, Plaintiffs pray for relief against Defendants as hereinafter set forth in the prayer for relief.

IX. THIRD CAUSE OF ACTION – AMEND. I, U.S. CONSTITUTION (FREE SPEECH – FREEDOM OF THE MIND AND CONSCIENCE)

44. Paragraph 1-43 of the Complaint are incorporated herein by reference, the same as though pleaded in full.

45. Defendant's policy, regulation, and custom and usage as set out above, both on its face and as applied, prescribes an orthodoxy of belief, attitude, and opinion regarding what one must do to become successful in life, constituting an unconstitutional intrusion upon the minds and consciences of Plaintiffs.

WHEREFORE, Plaintiffs pray for relief against Defendants as hereinafter set forth in the prayer for relief.

X. FOURTH CAUSE OF ACTION – AMEND I, U.S. CONSTITUTION (FREE SPEECH – VIEWPOINT DISCRIMINATION)

46. Paragraphs 1-45 of the Complaint are incorporated herein by reference, the same as though pleaded in full.

47. Defendant's policy, regulation, and custom and usage as set out above, both on its face and as applied, constitutes viewpoint discrimination because it prescribes an orthodoxy of belief, attitude, and opinion regarding

what one must do to become successful in life to the exclusion of all other viewpoints on the subject.

WHEREFORE, Plaintiffs pray for relief against Defendants as hereinafter set forth in the prayer for relief.

XI. FOURTH CAUSE OF ACTION – TITLE VII, 42 U.S.C. § 2000e (RELIGIOUS DISCRIMINATION)

48. Paragraphs 1-47 of the Complaint are incorporated herein by reference, the same as though pleaded in full.

49. Defendant's policy, regulation, and custom and usage as set out above, both on its face and as applied, discriminated against Plaintiffs because of Plaintiffs' religious beliefs.

WHEREFORE, Plaintiffs pray for relief against Defendants as hereinafter set forth in the prayer for relief.

XII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

a. Assume jurisdiction over this action;

b. Declare that Defendants' policy, regulation, and custom and usage, as challenged herein, is unconstitutional and in violation of Title VII, both on its face and as applied for the reasons set forth herein;

c. Enter a Judgment and Decree declaring that Defendant's policy, regulation, and custom and usage, as challenged herein, is unconstitutional in contravention of

the Establishment Clause, Plaintiffs' rights of free speech and free exercise of religion as guaranteed by the First Amendment (as incorporated through the Fourteenth Amendment) to the Constitution of the United States, and in contravention of Title VII's prohibition against discrimination on the basis of religion;

d. Grant a permanent injunction prohibiting Defendant, its employees, successors and agents and all persons subject to its direction and control from any further use of Program materials as described herein, or from instructing Program trainees, in any manner whatsoever, according to the orthodoxy of belief, attitude, and opinions as challenged herein, or from advancing the Buddhist religion as challenged herein;

e. Grant to Plaintiffs nominal damages;

f. Grant to Plaintiffs an award of their costs of litigation, including reasonable attorneys' fees and expenses pursuant to 42 U.S.C. § 1988 and/or 42 U.S.C. § 2000e-5(k);

g. Grant such other and further relief as this court deems necessary and proper.

Respectfully submitted,

By: /s/ _____

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WAYNE A. YOUNG, et al.,

Plaintiffs,

v. **Case No. 3:01-cv-1025-J-25TJC**

CITY OF JACKSONVILLE, FLORIDA,

Defendant.

_____/

JUDGMENT IN A CIVIL CASE

(Filed Sep. 19, 2002)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendant, City of Jacksonville, Florida, recover of the plaintiffs, Wayne A. Young, Marvin R. Edwards, Marvin F. Ferguson, Robert E. Garmon, Joseph B. Grooms, Henry W. Hart, Joseph R. Howell, Brandon T. Nelson, George A. Rhoden, and Joseph A. Blake, its costs of action.

Date: September 19, 2002 SHERYL L. LOESCH, CLERK

/s/ Sandra P. Wallen
By: Sandra P. Wallen, Deputy Clerk

Copy to:
Counsel of Record
Pro Se Party (if any)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WAYNE A. YOUNG, et al.,
Plaintiffs,

vs. **CASE NO. 3:01-cv-1025-J-25TJC**

CITY OF JACKSONVILLE, FLORIDA,
Defendant.

_____/

ORDER

(Filed Sep. 19, 2002)

THIS CAUSE is before the Court on Defendant City of Jacksonville's Motion to Dismiss with Prejudice (Dkt. 5), and Plaintiffs' response thereto. Upon consideration of same, the Court finds as follows:

Plaintiffs are employees of the City of Jacksonville's Fire and Rescue Department. On September 10, 2001, Plaintiffs brought this action claiming that in September 2000 they were forced by Defendant, despite their objections, to participate in a training program which instructed the participants in Buddhist beliefs. Plaintiffs, who are Christians, contend that this action violates their First Amendment right to Free Exercise of Religion and Free Speech, violates the Establishment Clause of the First Amendment, and constitutes viewpoint discrimination in violation of the First Amendment and religious discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.* ("Title VII"). Plaintiffs seek a declaration that the training program is unconstitutional, on its face and as applied,

and in violation of Title VII, a permanent injunction, enjoining Defendants from future use of the program, and nominal damages.

By this motion, Defendant seeks to dismiss this action, contending that Plaintiffs' claims are moot because it stopped using the offending training program prior to the commencement of this lawsuit. Plaintiffs assert that the matter is not moot because they have requested nominal damages, because the voluntary cessation of this allegedly illegal conduct cannot moot a claim, and because this case is capable of repetition, yet evading review.

The mootness doctrine applies when "events *subsequent* to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief." *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998). In contrast, the standing doctrine applies at the time the suit is commenced. *See Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234, 1267 (11th Cir. 2001); *Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262, 1285 (11th Cir. 2001). Since the program about which Plaintiffs complain ended almost one year before the commencement of the lawsuit, *see* Complaint at ¶ 20, the proper query is whether Plaintiffs have Article III standing to seek declaratory and injunctive relief regarding this program.

"In order to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *See Malowney v. Federal Collection Deposit Group*,

193 F.3d 1342, 1346-47 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190, 1205 (11th Cir. 1991).

> That is, under the facts alleged, there must a substantial continuing controversy between parties having adverse legal interests. . . . The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. . . . Additionally, the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury. . . . The remote possibility that a future injury may happen is not sufficient to satisfy the "actual controversy" requirement for declaratory judgments. . . .

Emory v. Peeler, 756 F.2d 1547, 1552 (11th Cir. 1985).

A review of the Complaint reveals that Plaintiffs have not alleged any facts from which it can be reasonably inferred that Defendant continues to use the offending program. Instead, the allegations support that the program ended September 30, 2000, almost a year before they brought this suit. *See* Complaint at ¶ 20. Because Plaintiffs make no allegations that Defendant plans to continue using the offending program or that Defendant intends to require Plaintiffs to participate once again in the program, there is no alleged threat of future injury warranting their need for injunctive relief. Consequently, Plaintiffs do not have Article III standing to litigate their claims for declaratory and injunctive relief.

This does not end the matter, however, because Plaintiffs claim that their request for nominal damages keep this case alive. The Court disagrees. Plaintiffs'

request for nominal damages cannot, under *these* circumstances, elevate this otherwise nonjusticiable matter into a legitimate case or controversy under Article III.

Certainly, there are cases that support a plaintiff's entitlement to nominal damages if they prove a denial of a constitutional right. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (allowing nominal damages following proof of a denial or right to procedural due process); *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980) (allowing nominal damages following proof of a violation of First Amendment rights).[1] However, these cases cannot be understood to allow a plaintiff who has an otherwise nonjusticiable case to maintain the action based on nominal damages alone. This is especially true, here, where there is no justiciable controversy permitting declaratory or injunctive relief and where Plaintiffs' request for nominal damages is merely incidental to the equitable relief they seek. *See Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2d Cir. 1973); *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d Cir. 1971); *cf. McKinnon v. Talladega County, Ala.*, 745 F.2d 1360, 1364 (11th Cir. 1984) (distinguishing *Kerrigan* and *Hernandez* by noting that, in the case before it, the damage claims, which could run into hundreds of thousands of dollars, were neither frivolous or incidental to the suit).

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[1] The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Accordingly, it is **ORDERED**:

1. Defendant City of Jacksonville's Motion to Dismiss with Prejudice (Dkt. 5) is **GRANTED**.

2. This action is hereby **DISMISSED WITH PREJUDICE**.

3. The Clerk is **DIRECTED** to enter judgment in favor of Defendant and against Plaintiffs and close this case.

DONE AND ORDERED in Chambers this 19th day of September, 2002.

/s/ _____
HENRY LEE ADAMS, JR.
UNITED STATES
DISTRICT JUDGE

Copies to:
Counsel of Record
Courtroom Deputy

No. 02-1744

IN THE

Supreme Court of the United States

WAYNE A. YOUNG, *et al.*,

Petitioners,

v.

CITY OF JACKSONVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

This Court should deny the writ for three reasons. First, the Petitioners have not demonstrated any meaningful basis for conflict between the Eleventh Circuit's decision and this Court's precedents or those of other circuits. Second, the Petitioners seek review based on a factual dispute they did not challenge below and have raised for the first time in this Court. Finally, the purported importance of the Eleventh Circuit's decision on the administration of justice is not apparent.

I.

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *CAREY* OR ANY OTHER PRECEDENT AND, IN ANY EVENT, IS AFFIRMABLE ON OTHER GROUNDS.

Petitioners' first argument is that the Eleventh Circuit ignored applicable precedents of this Court and lower federal courts in upholding the District Court's dismissal of their nominal damages claim as merely incidental to their defunct request for equitable relief (which was non-justiciable because the challenged program, *Secrets of Successful People*, had been discontinued a year prior to their lawsuit having been filed).

The Petitioners claim that the Eleventh Circuit's opinion conflicts with this Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978), as well as other federal appellate decisions. The Eleventh Circuit's unpublished decision,[1] however, raises

1. Petitioners attack the Eleventh Circuit's opinion as "conceived . . . in the shadows, suggesting its effect will extend no further than the unfortunate subjects of its illicit decree[.]" Petition (Cont'd)

no meaningful issue of importance for this Court's review based on conflict or otherwise. *Braxton v. United States*, 500 U.S. 344 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

Instead, the Eleventh Circuit specifically addressed the applicability of *Carey* and noted the important distinction, recognized by other circuits, between *awarding* nominal damages where a constitutional violation is proven at trial (but no actual damages are shown) and merely *pleading* a de minimis nominal damage claim that is incidental to an equitable claim that is no longer justiciable. *See, e.g., Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir 1973); *Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971). The Eleventh Circuit also noted that the Petitioners' allegations raised the specter of the de minimis doctrine, which holds that a constitutional violation does not result where the alleged imposition is inconsequential. *See Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("there is, of course, a de minimis level of imposition with which the Constitution is not concerned.").

As to purported conflict, Petitioners rely on distinguishable circuit court cases in which actual and punitive damages were pleaded, *e.g., Bernhardt v. County of Los Angeles*, 279 F.3d

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(Cont'd)

at 13. Respondent suggests that this attack is unfounded. Given the existence and prevalence of unpublished opinions in the Eleventh Circuit and elsewhere, combined with the ability of litigants to cite such opinions where appropriate (*see, e.g.*, 11th Circuit Rule 36-2), they cannot be considered "illicit" as Petitioners posit. Instead, they are the product of Article III powers that are just as deserving of respect and obedience as published opinions.

862, 872 (9th Cir. 2002) ("Bernhardt's complaint seeks compensatory and punitive damages."), liability had already been found, *e.g.*, *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999) (error to dismiss claim against city after jury found liability and awarded nominal and punitive damages against police officers) or a passing reference was made to the principle that monetary damage claims "creat[e] a live controversy." *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003).

Admittedly, language in the Tenth Circuit's decision in *Committee for First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992) comes close to conflicting with that of the Eleventh Circuit. But, even that court understood that the holding in *Carey* is limited to the remedial stage of litigation, not the pleading stage. *Id.* at 1526-27 ("If *proven*, a violation of First Amendment rights concerning freedom of expression entitles a plaintiff to at least nominal damages.") (emphasis added).

As to Petitioners' reliance on *Carey*, in that case this Court held that students who were denied a hearing (and thereby denied an "absolute" right to procedural due process) were entitled to recover only nominal damages not to exceed one dollar. The Seventh Circuit had ruled that the students were "entitled to recover substantial nonpunitive damages" such as emotional distress "even if their suspensions were justified and even if they do not prove that any other actual injury was caused by the denial of procedural due process." *Carey*, 435 U.S. at 248. This Court disagreed and held that "in the absence of proof of actual injury, the students are entitled to recover only nominal damages." *Id.*

Properly read, *Carey* is a limitation of remedy case in which nominal damages of one dollar were appropriate under the specific constitutional claim presented (i.e., an "absolute" right to procedural due process) where proof of actual injury did not

exist. This Court did not intend its ruling to be used in an expansive way, as is argued in the instant case. In fact, this Court has limited in a significant way the manner in which *Carey* is to be interpreted. *See Memphis Community School Dist. v. Strachura*, 477 U.S. 308 (1986) (noting that "*Carey* thus makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages.").

On this point, this Court rejected the contention that damages should be presumed to flow from every type of constitutional deprivation. *Carey*, 435 U.S. at 263. In doing so, it reasoned as follows:

> More importantly, the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. As we have said, . . . these issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question.

Id. at 265. This Court concluded that:

> Because the right to procedural due process is "absolute" in the sense that ***it does not depend upon the merits of a claimant's substantive assertions***, and because of the importance to organized society that procedural due process be observed, see *Boddie v. Connecticut*, 401 U.S. 371, 375, 91 S.Ct. 780, 784, 28 L.Ed.2d 113 (1971); *Anti-Fascist Committee v. McGrath*, 341 U.S. [123], at 171-172, 71 S.Ct., at 648-649 [(1951)] (Frankfurter, J., concurring), we believe that the denial of procedural

> due process should be actionable for nominal damages without proof of actual injury.

435 U.S. at 266-67 (emphasis added). The highlighted language makes evident that *Carey* is limited to an "absolute" constitutional right that is independent of any other substantive merits underlying a claimant's assertions. It does not extend to any and all alleged constitutional rights, and no allegation exists below that some "absolute" right was allegedly violated. As the Eleventh Circuit has recognized (and discussed in its decision below), the holding of *Carey* is not nearly as expansive as is often represented. *See, e.g., Oliver v. Falla*, 258 F.3d 1277, 1280 (11th Cir. 2001) (rejecting argument that *Carey* mandates an award of at least nominal damages for all constitutional violations such as an Eighth Amendment claim).[2] Petitioners fail to even mention the Eleventh Circuit's decision in *Oliver*, which was cited below.

Seen in this light, the decision in *Carey* supports the District Court's and Eleventh Circuit's decisions in the following way. Taking the allegations in the Petitioners' Complaint as true, they pleaded only nominal damages for an alleged violation of a purported constitutional right to be free from materials containing religious references with which they disagree. In doing so, it was reasonable to conclude that the Plaintiffs suffered no actual injury from the challenged training program. In the absence of an allegation of actual injury, the District Court was left with a non-justiciable, moot claim seeking at most a dollar's worth of relief based on a purported and unrecognized constitutional right not

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2. The Eleventh Circuit in *Oliver* specifically noted that the type of constitutional claim asserted is important in application of the holding in *Carey* by stating: "Oliver's reliance on *Carey* is misplaced for several reasons. First, *Carey* is a Fourteenth Amendment procedural due process case; Oliver alleges an Eighth Amendment violation." 258 F.3d at 1280.

to be subject to a discontinued training program, conducted only once, whose three-hour video and thirty-page booklet contained a small segment that referred to Buddhism. Under these circumstances, it is understandable that the District Court dismissed (and the Eleventh Circuit affirmed) the nominal damages claim as merely incidental to the primary claims seeking declaratory and equitable relief.

To the extent Petitioners assert that the Eleventh Circuit misapplied the holding in *Carey*, they are mistaken. As indicated above, the Eleventh Circuit clearly understood the principles of *Carey*, but distinguished that decision by noting that the Petitioners' expansive reading of that case was not reflected in the caselaw. No misapplication of *Carey* exists. In any event, a "misapplication" theory is generally a poor vehicle for certiorari review. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Finally, certiorari is improvident where a ruling – even if based on an erroneous legal theory – is supportable based on another theory asserted below. Here, the District Court was correct, either in dismissing the action because of the incidental nature of the nominal damage claim pleaded or, alternatively, for the lack of cognizable constitutional claims.[3] Either basis would be a proper one for affirmance. *Foster v. Kassulke*, 898 F.2d 1144, 1146 (6th Cir. 1990) ("[a] decision below must be affirmed if correct for any reason, including a reason not considered by

3. Respondent asserted in the District Court and the Eleventh Circuit that the Petitioners failed to plead claims for relief under the Establishment, Free Exercise, and Free Speech Clauses. Respondent asserted that Petitioners' nominal damage claims did not meet any of the three Establishment Clause tests (endorsement test, coercion test, or *Lemon* test) and did not state claims for violations of a constitutional right to exercise one's religion or free speech.

the lower court") (*quoting Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985)). That the Eleventh Circuit relied upon one basis for affirmance (incidental nature of nominal damage claim) does not eliminate an equally compelling basis for affirmance (lack of cognizable claim for a constitutional deprivation). For all these reasons, certiorari review would be ill advised.

II.

PETITIONERS RAISE A FACTUAL DISPUTE TO WHICH THEY DID NOT OBJECT BELOW, EITHER IN THE DISTRICT COURT OR THE ELEVENTH CIRCUIT.

Petitioners' second argument in support of certiorari is that the District Court erred in making (and the Eleventh Circuit erred in relying upon) the factual finding that the City discontinued the challenged program, *Secrets of Successful People*, a year prior to Petitioners filing their lawsuit.

Petitioners overlook that they acquiesced in these factual findings below without objection and thereby have no grounds for lodging their objection for the first time in this Court. *See, e.g., Steagald v. United States*, 451 U.S. 204, 209 (1981) (party "may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.").

Specifically, Petitioners made no objection to the District Court's factual findings as to the discontinuation of the challenged program,[4] either in the District Court or in the Eleventh Circuit. Petitioners presented no motion for rehearing or clarification seeking to correct this alleged factual error to either of those courts. Having failed to even attempt to preserve this alleged factual error below, either in the District Court or the Eleventh Circuit, Petitioners' request for certiorari review by this Court must fail. Moreover, a run-of-the-mill dispute over factual matters is not a productive basis for certiorari review absent extraordinary circumstances, which do not exist in this case. *Cf.* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . .").

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4. The District Court made the uncontested factual finding that "the program about which Plaintiffs complain ended almost a year before the commencement of the lawsuit[.]" Pet. App. 24 The District Court's order also stated that the Petitioners' complaint "reveals that Plaintiffs have not alleged any facts from which it can be reasonably inferred that Defendant continues to use the offending program. Instead, the allegations support that the program ended on September 30, 2002, almost a year before they brought this suit." Pet. App. 25 (*citing* Complaint at ¶ 20). The order also stated that "[b]ecause Plaintiffs make no allegations that Defendant plans to continue using the offending program or that Defendant intends to require Plaintiffs to participate once again in the program, there is no alleged threat of future injury warranting their need for injunctive relief." Pet. App. 25 Petitioners did not challenge any of these findings in the District Court or in the Eleventh Circuit.

III.

THE QUESTIONS PRESENTED ARE NOT WORTHY OF CERTIORARI.

Finally, Petitioners – despite their allusion to *Marbury v. Madison*, 1 Cranch 137 (1803) – have not shown an issue of importance that would justify inclusion on this Court's limited docket. As discussed above, this case presents a matter of a de minimis nature that was properly dismissed due to the lack of a justiciable controversy.

CONCLUSION

Based on the foregoing, Respondent, City of Jacksonville, Florida, respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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